

# Fordham Law Review

---

Volume 9 | Issue 1

Article 3

---

1940

## The "From, Through or Under" Rule As To Competency of Witnesses

Arthur H. Goodman

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Arthur H. Goodman, *The "From, Through or Under" Rule As To Competency of Witnesses*, 9 Fordham L. Rev. 65 (1940).

Available at: <https://ir.lawnet.fordham.edu/flr/vol9/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The "From, Through or Under" Rule As To Competency of Witnesses

Cover Page Footnote

Member of the New York Bar

# THE "FROM, THROUGH OR UNDER" RULE AS TO COMPETENCY OF WITNESSES

ARTHUR H. GOODMAN†

"Sec. 347. *Personal transaction or communication between witnesses and decedent or lunatic.* Upon the trial of an action . . . a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest. . . ."

—NEW YORK CIVIL PRACTICE ACT.

IT IS a truism that a litigant in quest of a judicial determination of his rights should have at his disposal legally admissible proof of his version of the facts. And any rule of law which prescribes limitations with respect to the competency of witnesses strikes with an effect almost always painful, often irremediable.

Despite the harm latent in the application of any broad, exclusionary principle, courts and legislatures have been willing, since the earliest times, to bar certain classes of witnesses, where it was thought that the triers of the facts might thereby be assisted in ascertaining where the truth lay.<sup>1</sup> In this spirit it was, that the early common law courts of England adopted the rule, of indistinct historical beginnings, that the testimony of "a party or person interested in the event"<sup>2</sup> was so unworthy of credit as not to merit reception in evidence. Notwithstanding its severity, this judicial mandate endured until early in the nineteenth century, when, largely as a result of the writings of Jeremy Bentham, Lord Denman's Act removed the disqualification except as to

---

† Member of the New York Bar.

1. *Interest*: As early as 1611 Lord Coke held that "the parties to the supposed usurious contract shall not be admitted witnesses, for this, that upon the matter they were *testes in propria causa* . . ." Smith's Case, 12 Co. Rep. 69, 77 Eng. Reprints 1347 (1611). See 3 BL. COMM. \*369.

*Color*: People v. Howard, 17 Cal. 63 (1860) (a negro, the complainant, not competent to testify against white defendant); United States v. Butler, 25 Fed. Cas. No. 14,699 (C. C. D. C. 1812).

*Infamy*: Commonwealth v. McGuire, 84 Ky. 57 (1886) (perjurer disqualified); Lyford v. Farrar, 31 N. H. 314 (1855) (petty larceny); State v. James, 15 S. C. 233 (1831).

*Mental capacity*: Ray v. State, 32 Ga. App. 513, 124 S. E. 57 (1924) (idiot not allowed to testify).

*Intoxication*: Hartford v. Palmer, 16 Johns. 143 (N. Y. 1819).

2. "All witnesses, of whatever religion or country that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause." 3 BL. COMM. \*370.

On the history of the rule, see 1 WIGMORE, EVIDENCE (2d ed. 1923) § 575, and PHIPSON, EVIDENCE (7th ed. 1931) 435.

parties and their spouses.<sup>3</sup> The distinction as to the latter classes of persons was short-lived, and by 1851 it was the law that no persons were barred from the witness stand by reason of interest.<sup>4</sup> Under early American law, also, an interested person had no right to testify.<sup>5</sup> And further paralleling developments abroad, this gave rise to such great dissatisfaction, that before the passing of the first decade of the present century the exclusionary rule was abolished by statute in every state of the union.<sup>6</sup>

In England the classic canon has been swept away without a trace; here, however, a vestigial remnant survives. Bearing witness to the law's lingering distrust of those whose interests are at stake, are statutes which seek to protect persons who, because of the death or mental incompetency of one party to a transaction, are handicapped in obtaining proof with which to rebut the testimony of the survivor. In most jurisdictions, including our own, it is provided that one who is interested in the outcome of the litigation may not testify, in opposition to a party protected by the law, concerning a personal transaction with the decedent or lunatic.<sup>7</sup> Other legislatures, while permitting such testimony to be offered, require that there be corroboration from a disinterested source.<sup>8</sup> A third group of states has sought to restore a measure of testi-

3. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (Bowring's ed. 1827) bk. 9, pt. 3, c. 3, p. 393: "In the eyes of the English lawyer, one thing, and one thing only has a value: that thing is money. . . . Such is his system of psychological dynamics.

"If you will believe the man of law, there is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; . . . weighed against the interest produced by the value of a farthing, the utmost mass of interest producible from the action of all those affections put together, vanishes in the scale. . . . For a farthing, for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science; this in Westminster Hall is law." See 1 WIGMORE, *EVIDENCE* § 577 for further quotations from Bentham. See also Lord Denman's Act, 1843, 6 & 7 Vict. c. 85.

4. Evidence Act, 1851, 14 & 15 Vict. c. 99; Evidence Act, 1853, 16 & 17 Vict. c. 83.

5. In the following criminal cases the defendants were not permitted to testify: *Batro v. State*, 18 Ala. 119 (1850); *Whelchell v. State*, 23 Ind. 89 (1864); *State v. Laffer*, 38 Iowa 422 (1874).

In civil cases the interested parties could not be witnesses: *Reece v. Johnson*, 20 Fed. Cas. No. 11,633a (Super. Ct. Terr. Ark. 1829); *Shahen v. Strauss*, 199 Ill. App. 403 (1916); *Ashorn's Adm'x v. Cummings*, 4 Tex. 10 (1849).

6. For references to the statutes, American and foreign, see 1 WIGMORE, *EVIDENCE* § 488.

7. FLA. COMP. LAWS ANN. (1927) § 4372; IOWA CODE (1935) § 11257; N. Y. CIV. PRAC. ACT (1921) § 347; OHIO GEN. CODE (Page, 1926) § 11495; UTAH REV. STAT. ANN. (1933) § 104-49-2.

Under VT. PUB. LAWS (1931) § 1694 the survivor is incompetent as to all matters; and under CAL. CODE CIV. PROC. (Deering, 1935) § 1880 the exclusion applies to all matters occurring during decedent's lifetime.

8. N. M. STAT. ANN. (Courtright, 1929) § 45-601; VA. CODE (Michie, 1930) § 6209.

monial equality by sanctioning the use of hearsay declarations of the decedent or incompetent, as an antidote to the survivor's testimony.<sup>9</sup> Another solution has been to pass the burden on to the courts, which are directed by statute to hear the survivor "when it appears that . . . injustice will" otherwise result.<sup>10</sup>

Frequency and difficulty of interpretation have made these rules the subject of heated debate, and from dissenting authorities has come a merciless hail of criticism. In opposition to the various forms of statutory disqualification the arguments are made that the meritorious claims of the living ought not, in such wholesale fashion, be sacrificed in order to preserve the estates of the dead and the insane,<sup>11</sup> that the weapon of effective cross-examination offers sufficient assurance that the mendacious perjurer, though not directly contradicted, will be sufficiently discredited,<sup>12</sup> and that, in any event, those who could successfully falsify will not be thwarted by the fact of interest, but will, readily enough suborn another for the purpose.<sup>13</sup> Finally, the premise underlying the statutes: that interest raises a great likelihood of falsification, is attacked as libelous and unsound.<sup>14</sup>

On the other hand, courts and legal writers without number have declared, in terms of highest approval that these laws are essential aids

9. CONN. GEN. STAT. (1930) § 5609; MASS. ANN. LAWS (Lawyer's Co-op., 1933) c. 233, § 66; ORE. CODE ANN. (1930) § 9-403; R. I. GEN. LAWS (1923) § 5039.

10. N. H. PUB. LAWS (1926) c. 336, §§ 27, 28; MONT. REV. CODE ANN. (Choate, 1921) § 10535.

In Louisiana, interest goes only to the credibility of the witness, LA. CODE PRAC. (Dart, 1932) § 2282.

11. See *St. John v. Loffland*, 5 N. D. 140, 143, 64 N. W. 930, 931 (1895), where the court said: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claim than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses."

See *Corbett v. Huigan*, 19 Ariz. 134, 146, 166 Pac. 290, 294 (1917) (quoting Wigmore's statements in opposition to these statutes). In (1934) 6 MISS. L. J. 409, the writer states that "to die is gain for the estate of the decedent, though at the expense of the living."

12. 1 WIGMORE, EVIDENCE § 578, where the author points out that "in any case the test of cross-examination and other safeguards for truth are a sufficient guaranty against frequent false decision." Taft, *Comments on Will Contests in New York* (1921) 30 YALE L. J. 593, 605, takes the view that "more reliance should be placed upon the efficacy of our process of investigating truth."

13. See (1933) 46 HARV. L. REV. 834, 835; REP. OF LEGAL RESEARCH COMMITTEE OF COMMONWEALTH FUND (1927).

14. REP. OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS (1848) says that these statutes are unnecessary and harmful; that the contrary view "implies, that in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit as to deceive courts and juries."

for the protection of the estates of decedents and lunatics.<sup>15</sup> By the all-encompassing language in which their enactments are couched several legislatures, notably that of New York, have evidenced the firm conviction that the law must restore balance where events have given one side an opportunity to fabricate without fear of direct contradiction.<sup>16</sup> Responsive to legislative policy and often with unequivocal endorsement thereof the courts in many jurisdictions have sought, by construction, to extend, rather than to confine the scope of the statutory disqualification.<sup>17</sup>

### *The New York Statute*

Easily the broadest and probably the most troublesome of the "dead man" laws is Section 347 of the New York Civil Practice Act.<sup>18</sup> Because its language is so inclusive with respect to the witnesses and testimony barred and the parties protected, an incalculable diversity of difficulties has arisen in its application. For this reason, also, the Section offers a fertile though by no means virginal field for stimulating analysis.

The statute, in its entirety, is a subject for a volume.<sup>19</sup> A segment of it, however, may prove appropriate for the few succeeding pages. It will be noticed that among the classes of witnesses barred is "a person from, through or under whom" the party or interested person who offers the testimony "derives his interest or title"; and that one of the parties pro-

---

15. See *Louis' Adm'r v. Easton*, 50 Ala. 470, 472 (1873); *Garvey v. Owens*, 37 Hun 498, 503 (N. Y. 1885) (statute regarded as beneficial and, hence, not to be narrowed by construction); *Matter of Carroll*, 153 Misc. 649, 660, 275 N. Y. Supp. 911, 923 (Surr. Ct. 1934) (statute desirable shield to prevent unjust claims and its use indicated by experience); *Owens v. Owens' Adm'r*, 14 W. Va. 88, 95 (1878) (court of opinion that in absence of statutes, estates would be prey for the dishonest).

Richardson states that "fairness requires that some exception should be made where the adversary in the controversy is dead." RICHARDSON, EVIDENCE (4th ed. 1931) § 462.

The purpose of the rules is, as has often been said, to restore testimonial equality. *Louis' Adm'r v. Easton*, 50 Ala. 470 (1873); *Whitmer v. Rucker*, 71 Ill. 410 (1874); *Beach v. Pennell*, 50 Me. 587 (1862); see *Freygang v. Train*, 42 Misc. 49, 51, 85 N. Y. Supp. 538, 539 (Sup. Ct. 1903).

16. Note 7, *supra*.

17. Note 15, *supra*.

18. The section, so far as here material, provides that "a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic. . . ."

19. GREENFIELD, TESTIMONY UNDER § 347, CIVIL PRACTICE ACT, FORMERLY § 829, CODE OF CIVIL PROCEDURE (1923) deals exclusively with the New York statute.

tected by the law is "a person deriving his title or interest from, through or under a deceased person or lunatic . . . ." What constitutes this derivation of title or interest to one person "from, through or under" another is, in the language of a recent case, "that concerning which most mental confusion appears to exist."<sup>20</sup> Even a cursory inspection of the Section reveals the crux of the difficulty. A devolution of title or interest which excludes a witness and protects a party is one that takes place "by assignment or otherwise." From this expression nothing can be gleaned other than that the rule contemplated by the law makers is one as broad as words can convey.<sup>21</sup> The task of describing proper limitations, in order that the enactment may remedy, without overreaching, the mischief at which it is aimed, has thus fallen, full weight upon the courts; and, reflective of phraseology so lacking in definitive precision, their decisions do not declare clearly and with unanimity the law applicable to the novel and even many of the more common situations that have arisen.

With the hope of indicating some of the inconsistencies and conflicts, and of suggesting a possible solution, this paper is presented.

### *The Common Law Rule*

Section 347 is, by express provision of the Civil Practice Act, a qualification of the rule that "a person shall not be excluded . . . from being a witness by reason of his or her interest in the event."<sup>22</sup> One might conclude, therefore, that the function of the statute is merely to preserve a portion of the common law disqualification. Under the decisions, however, no such inference is tenable, for in many fundamental respects the present rule, by sheer breadth of scope, dwarfs its common law precursor.<sup>23</sup>

Underlying the provision that one may not testify in behalf of his successor in interest is the theory that a witness so situated is morally, if not legally responsible for the validity of the transfer, and, being anxious to preserve his standing in the business community, may color his testimony in favor of the transferee.<sup>24</sup> At common law, on the other

20. *Matter of Christie*, 167 Misc. 484, 489, 4 N. Y. S. (2d) 484, 491 (Surr. Ct. 1938).

21. See *Holcomb v. Holcomb*, 95 N. Y. 316, 325 (1884); *Matter of Christie*, 167 Misc. 484, 491, 4 N. Y. S. (2d) 484, 493 (Surr. Ct. 1938).

22. N. Y. CIV. PRAC. ACT (1921) § 346.

23. 5 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926) 4244 *et seq.*, where it is pointed out that details of wording in many instances have brought about a disqualification which did not exist at common law. But see *West End Brewing Co. v. Utica Trust & Deposit Co.*, 175 App. Div. 477, 478, 162 N. Y. Supp. 537, 538 (4th Dep't 1916).

24. See *Abbott v. Doughan*, 204 N. Y. 223, 226, 97 N. E. 599, 600 (1912) where the court stated that an "assignor would be morally and indirectly, if not legally and directly,

hand, such considerations of conscience and reputation were, standing alone, insufficient to bar the witness.<sup>25</sup> Only a legal obligation worked a disqualification and the test was whether a person sought to testify in behalf of one who, if unsuccessful, would have a right of recourse by way of "liability over" against the witness. Under this rule a vendor of personal property was not available to his vendee if the latter's title were in controversy, for the witness would be subject to suit on his implied warranty of title.<sup>26</sup> This applied also to a grantor of realty where the conveyance contained a covenant of title;<sup>27</sup> and, since the covenantor's obligation runs with the land, all subsequent owners succeeded to the disadvantage suffered by the immediate grantee.<sup>28</sup> At common law, in a word, the courts looked to the purely legal rights and liabilities of the witness as the determinant of his competency. Our law of today, on the other hand, directs its inquiry to the personal relationship between the witness and the party who calls him, with the result that the intimacy and unity of interest arising out of the relationship of predecessor and successor are the basis of disqualification.<sup>29</sup>

The complementary provision, under which the statute may be invoked by one who derives his interest "from, through or under" a decedent or lunatic, is altogether without common law precedent, for the old rule, excluding interested witnesses, was available to any party against whom such testimony was offered. Identical in terms with the clause under which the predecessor in interest is barred, this provision

---

interested in maintaining the validity and integrity of the assignment, and, therefore, to that extent would be a biased witness." See also *Harrington v. Schiller*, 231 N. Y. 278, 288, 132 N. E. 89, 90 (1921) to the same effect.

25. *United States v. Lyle*, 26 Fed. Cas. No. 15,645 (C. C. D. C. 1806); *Crary v. Carradine*, 4 Ark. 225 (1842) (defendant's brother, morally bound by gratuitous promise to pay whatever judgment plaintiff recovered, competent, nevertheless, to testify for defendant); *Smith v. Downs*, 6 Conn. 365 (1827) (to like effect).

26. *Kussenberg v. Browne*, 42 Pa. 173 (1862) (trover for coal); *Wright v. Bonta*, 19 Tex. 385 (1857) (replevin; predecessor incompetent because of liability on covenant of title); *Parker v. Hammond*, 13 Vt. 242 (1841) (trespass to chattels; vendor not permitted to testify in support of vendee's title).

27. *Farley v. Woodburn*, 10 N. J. Eq. 96 (1854) (ejectment; defendants' grantor incompetent to testify for them); *Lawrence v. Senter*, 4 Sneed 51 (Tenn. 1856).

28. *Blackwell v. Atkinson*, 14 Cal. 470 (1859); *cf. Waller v. Stewart*, 29 Fed. Cas. No. 17,109 (C. C. D. C. 1835) where a witness whose liability to the party calling him was barred by lapse of time, was permitted to testify.

29. The precise language of the cases is to the effect that a predecessor in interest is disqualified because he is morally interested in the validity of the assignment. See note 24, *supra*. This argument, if literally construed, is hardly a sound basis for the disqualification, for it gives rise to the paradox that the transferrer, acutely sensitive to the moral responsibility that the devolution imposes, is, nevertheless, ready, in disregard of conscience and dire legal consequences, to violate his oath.



protects the transferee of a decedent or lunatic in order that the defense of a disputed title, already quite difficult without the testimony of the person from whom come whatever rights are claimed, may not be doomed to certain failure.

### *The Less Difficult Cases*

Section 347 is no stranger to the courts. Indeed, the number of adjudicated cases indicates an almost daily application of the statute, and, from the vast number of instances, certain rather well settled rules have evolved with respect to what constitutes a devolution of interest "from, through or under" another person "by assignment or otherwise." The rulings of the courts in these less difficult situations, being no longer susceptible of argument, may be set down without extended discussion.

In harmony with the broad language of the Section, and consistent with their conviction that the statute serves a salutary purpose, the courts have been generous in describing the circumference of its operation. Particularly have the words "by assignment or otherwise" been applied over a most inclusive radius. Considering first the question of who is an assignee entitled to the protection of the law, we find that a grantee of realty is deemed to have taken by assignment,<sup>30</sup> despite the fact that that word is more appropriately used to describe transactions involving choses in action. Pledges,<sup>31</sup> indorsees,<sup>32</sup> and donees<sup>33</sup> are all assignees; and one whose deed runs from an executor is deemed to have taken by assignment from the decedent.<sup>34</sup> Barred by the companion provision from testifying in behalf of those who take from them are, among others, vendors and donors.<sup>35</sup> Legatees, devisees, and distributees, being the persons with whose interests the rule is chiefly concerned,

---

30. *Mattoon v. Young*, 45 N. Y. 696 (1871); *Chadwick v. Louver*, 69 N. Y. 404 (1877) [involved CODE CIV. PROC. (1876) § 399]; *Rice v. Daly*, 49 St. Rep. 321, 20 N. Y. Supp. 941 (Sup. Ct. 1892).

31. *Smith v. Hazard*, 4 Hun 418 (N. Y. 1875) [this case, construing CODE CIV. PROC. (1867) § 399, protects pledgee of a mortgage].

32. *Merchants' Nat. Bank v. Prescott*, 139 Misc. 603, 249 N. Y. Supp. 6 (Sup. Ct. 1931).

33. *Cornell v. Cornell*, 12 Hun 312 (N. Y. 1877); see *Howell v. Taylor*, 11 Hun 214, 216 (N. Y. 1877) (donee inter vivos is protected).

34. *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278 (1890) (action to enforce covenant for renewal of lease); *Brewster v. Short*, 43 St. Rep. 768, 17 N. Y. Supp. 799 (Sup. Ct. 1892); *Morse v. Dayton*, 85 Misc. 12, 147 N. Y. Supp. 63 (App. Term 1914) (goods sold and delivered, brought by assignee of decedent's executor).

35. *McCotter v. Lawrence*, 4 Hun 107 (N. Y. 1875) (assignor of rights under executory contract barred); *White v. White*, 28 Hun 54, 16 Wkly Dig. 45 (N. Y. 1882) (donor barred); see *Conway v. Moulton*, 6 Hun 650, 651, 2 Wkly Dig. 242 (N. Y. 1876) (vendor excluded); *Levy v. Louvre Realty Co.*, 222 N. Y. 14, 20, 118 N. E. 207, 209 (1917) (assignor not permitted to testify).

are held to take "by assignment or otherwise", as that catch-all phrase is used in the statute.<sup>36</sup>

In order that the rule of exclusion may be invoked against a witness by an objectant it is not necessary, under the present wording of the statute, that he claim to be the direct successor to the decedent or lunatic. An owner of property takes "from" the remote grantor, "through" the immediate one, and "under" both.<sup>37</sup> The opposite result obtains, however, when an owner other than the last previous one seeks to testify *in behalf of* one who asserts a present claim to the property in question. By an inconsistency that has needlessly confused the case law, and is as yet unexplained in any of the authorities, only the immediately prior owner is disqualified.<sup>38</sup>

Analysis of pleadings and the sequence of proof are important, for the statute is not available unless, by the time the disputed testimony is offered, the record shows that the objectant at least makes claim to a right devolving from, and not antagonistic<sup>39</sup> to that of the decedent or lunatic. To illustrate: if, in a conversion action the plaintiff offers proof of a transaction with a decedent, the defendant, who has pleaded a general denial and has theretofore said nothing about the source of his title, may not object.<sup>40</sup> Also, in an action by an administrator to recover on a loan, if the defendant merely denies that he is the borrower, no objection lies in his favor.<sup>41</sup> The court, moreover, may refuse to apply the statute where the evidence shows unquestionably that the objectant, whose claim is said to be based on succession to the decedent, has obviously no right whatever to the property in question. In the rare instances of this type, the courts, assuming by a dangerous kind of foresight, to know the answer to the very question in controversy, take the

---

36. *Hatch v. Peugnet*, 64 Barb. 189 (N. Y. 1872) (legatee not allowed to testify in probate proceeding); *Schoonmaker v. Wolford*, 20 Hun 166 (N. Y. 1880); *Bambauer v. Schleider*, 176 App. Div. 562, 163 N. Y. Supp. 186 (2d Dep't 1917) (heir at law entitled to object); *Percy v. Huyck*, 226 App. Div. 142, 234 N. Y. Supp. 635 (4th Dep't 1929), *modified on other grounds*, 252 N. Y. 165, 169 N. E. 127 (1929) (protects beneficiary of testamentary trust).

37. *Pope v. Allen*, 90 N. Y. 298 (1882); *Smith v. Cross*, 90 N. Y. 549 (1882); *cf.* *Cary v. White*, 59 N. Y. 336 (1874) where, applying CODE CIV. PROC. § 399, it was held that only immediate assignees were protected. This is no longer law.

38. *Rauk v. Grote*, 110 N. Y. 12, 17 N. E. 665 (1888); *Bishop v. Bishop*, 121 Misc. 509, 201 N. Y. Supp. 256 (Sup. Ct. 1923) (action to remove cloud on title); see (1924) 24 COL. L. REV. 93, and RICHARDSON, EVIDENCE 336 where it is said that if *A* sells to *B* and *B* to *C*, who died, *A* could testify against the estate, but *B* could not.

39. *Mason v. Prendergast*, 120 N. Y. 536, 24 N. E. 806 (1890).

40. *Lyon v. Whittaker*, 77 Hun 107, 28 N. Y. Supp. 296 (1894).

41. *Wakefield v. Wakefield*, 47 Misc. 87, 93 N. Y. Supp. 554 (Sup. Ct. 1905).

position that since the objectant's title is patently bad he could not have taken from the decedent.<sup>42</sup>

The fact that one's right to claim property as successor to a decedent is subject to a contingency does not always make the statute unavailable. In one case, a probate proceeding, the contestant was a person not mentioned in the will and who would not benefit in the event of an intestacy, but was a beneficiary under a prior will. Her interest, the court held, though contingent and uncertain, was derived from the decedent within the meaning of the rule.<sup>43</sup> However, not all contingent claims of this sort are held to bring the statute into play. Extending the last mentioned situation a step further, if the decedent leaves three wills and the contestant faces the task of successfully contesting the last two of them, his interest is too remote to give him protection.<sup>44</sup>

Two cases are to be found of which mention should be made, for the reason that, although the questions arising under the statute were palpably simple, certain erroneous and misleading statements by careless oversight found their way into the opinions. In *Harris v. Morse*,<sup>45</sup> the plaintiff sued to impress a trust upon certificates of stock, legal title to which was in the defendant. The plaintiff claimed an equitable interest under an oral agreement with the decedent, Russell, who during his lifetime had been an owner as co-adventurer with the defendant. The court rightly refused to permit the plaintiff to testify to transactions with the decedent. However, it rested this holding not upon the proper ground that the objecting defendant derived his interest from the decedent, but upon the untenable argument that the latter was the source of the plaintiff's claim. Whether the party offering testimony has succeeded to a decedent's title is never the test of its admissibility.

*Hall v. Wagner*<sup>46</sup> was an action to replevy stock certificates. Suit was brought by an executor who contended that one *W* had fraudulently obtained possession of the documents and had sold them to the defendants. The latter contended that *W* had acquired title from the decedent and, in support of this claim, offered to prove by *W*, certain dealings that *W* had had with the deceased. This proof was properly rejected, but upon the fallacious argument that the witness derived

---

42. *Howe v. Bell*, 143 N. Y. 190, 38 N. E. 200 (1894). In *Cadmus v. Oakley*, 3 Dem. Surr. 324, 326 (N. Y. 1885) it was stated that "deriving title or interest" means claiming to derive title or interest, and that, therefore, a person who was named as legatee in a will, could invoke the statute in a probate proceeding before it had been found that he was, in fact, a legatee.

43. *Matter of Smith*, 95 N. Y. 516 (1884).

44. *Matter of McCulloch*, 263 N. Y. 408, 189 N. E. 473 (1934).

45. 54 F. (2d) 109 (S. D. N. Y. 1931).

46. 111 App. Div. 70, 97 N. Y. Supp. 570 (1st Dep't 1906).

title from the decedent. The valid reason for refusing to hear *W* was that the defendants, whose witness he was, derived their title from him.

*Title or Interest Must Be In Issue*

In order that the rule may not take in territory beyond that affected by the injustice it aims to eliminate, the courts of all jurisdictions have consistently declared that a witness is disqualified only where the effect of the transfer to the party calling him is actually in issue.<sup>47</sup> It is not possible, however, by any process of deduction from the particular cases, to state categorically a generally applicable test as to when the devolution of interest or title is so divorced from the litigated controversy as not to work a bar. All that can be ventured is a brief treatment of the cases best illustrative of the prevalent types in point.

Quite often the transfer from the person offered as a witness is obviously an incidental circumstance, so far removed from the points in dispute, that the courts have recognized the injustice in refusing to hear the testimony. The early case of *Rockwell v. Peck*<sup>48</sup> presented such a situation. Two persons, represented in the suit by their respective executors, had operated certain real estate under a contract of partnership, for a breach of which the action was brought. The testimony of the individual who had sold the property to the partners was permitted to be taken, since the cause of action had arisen, in all its aspects, from the transactions between the decedents, and the deed from the witness bore no relation whatever to the litigated controversy.

Where a claim to property is asserted on the basis of two sets of facts, either of which, if established, will sustain the title independently of the other, but under one of these groups of facts the claimant relies upon a derivation of title from a person offered as a witness, the latter may testify only in support of the other group. This type of situation is most vividly illustrated by the case of *Harrington v. Schiller*.<sup>49</sup> A mother

---

47. *Abbott v. Doughan*, 204 N. Y. 223, 97 N. E. 599 (1912) (sale from witness to plaintiff not in issue, and hence, testimony received); *Stern v. Stern*, 122 App. Div. 821, 107 N. Y. Supp. 900 (1st Dep't 1907) (action to rescind a contract; fact that witness had previously contracted with respect to same subject matter did not bar him); *Shook v. Fox*, 126 App. Div. 565, 110 N. Y. Supp. 951 (3d Dep't 1908).

48. 13 App. Div. 621, 43 N. Y. Supp. 196 (3d Dep't 1897). The court said, at 622, 43 N. Y. Supp. at 199, that "the cause of action here alleged was not derived from the assignor, but arose out of subsequent transactions of Rockwell and Peck . . ." To the same effect is *Squire v. Greene*, 38 App. Div. 431, 56 N. Y. Supp. 551 (2d Dep't 1899).

49. 231 N. Y. 278, 132 N. E. 89 (1921) The fact that a person was once the owner of the property in question does not, of itself, bring the statute into play. *Uhlmann v. Brownell*, 50 Hun 602, 3 N. Y. Supp. 699 (1888), *aff'd*, 121 N. Y. 652, 24 N. E. 1091 (1890).

deeded land to her daughter, who orally agreed to hold it in trust for the grantor. The plaintiff sued to enforce the trust agreement and claimed in the alternative that she was the absolute owner of the property. There was proof that the decedent had reconveyed to the plaintiff, who later granted the land to one *W*; and that *W* then conveyed it to the plaintiff and *M* as joint tenants. *M*, having quitclaimed her interest to the plaintiff, was permitted to testify in the latter's behalf, not in support of the chain of title culminating in the quitclaim deed, but only in aid of the contention that an oral trust had been declared.

On the same reasoning—that the mischief of the statute is not involved where no question is raised as to the validity of the transfer by the witness—it has been decided that a grantor of realty may testify for his grantee, who resists foreclosure of an usurious mortgage;<sup>50</sup> and that in an action to recover for the conversion of a chattel, the person who sold it to the plaintiff may be his witness, provided in both of these instances, that there is no dispute as to the party's title.<sup>51</sup>

#### *Fiduciaries and Other Representatives as Sources of Title*

Little difficulty has been encountered in dealing with situations in which a party, claiming title to property by virtue of a transaction with the agent of a principal since deceased, seeks to avail himself of the agent's testimony. Here, the courts have reasoned, the party does not claim through the witness, for if the latter acted within his authority, his principal, and not he, was the source of title; and, if the transaction was unauthorized, no devolution whatever could have taken place.<sup>52</sup>

Somewhat more bothersome, however, has been the question of whether a beneficiary of a trust derives title from the trustee or from the settlor. In *Wilkins v. Baker*,<sup>53</sup> the earliest New York case in point, the majority of a divided court declared that remaindermen under a trust claimed from the trustee and, therefore, could not call him to prove a transaction with the deceased settlor. A few years later in *Garvey v. Owens*<sup>54</sup> the rule was enunciated that a settlor was not available as a witness in behalf of his beneficiary. Thus the law rested, with settlor and trustee both disqualified, until more recently, when the case of *Gol-*

50. *Meaker v. Fiero*, 77 Hun 65, 28 N. Y. Supp. 469 (1894), *rev'd on other grounds*, 145 N. Y. 165, 39 N. E. 714 (1894).

51. *Abbott v. Doughan*, 204 N. Y. 223, 97 N. E. 599 (1912).

52. *Albany Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427 (1896) (agent testified to prove that he lacked authority to act in the premises); *Lecour v. Importers' & Traders' Nat. Bank*, 61 App. Div. 163, 70 N. Y. Supp. 419 (1st Dep't 1901) (agent proved he did have authority).

53. 24 Hun 32 (N. Y. 1881).

54. 37 Hun 493 (N. Y. 1885).

*land v. Golland*,<sup>55</sup> an action to subject a devise absolute in form to a secret oral trust in the plaintiff's favor, arose. To establish that the devisees had agreed with the testatrix to hold the property in trust, one of the alleged trustees was offered as a witness, and, directly contrary to the ruling of the *Wilkins* case, but without reference to it, the court received the proof. In answer to the objectant and, we might add, by way of adequate refutation of the earlier decision, the court argued that a *cestui que* does not *succeed* to any title formerly held by a trustee; and that the impressment of a constructive trust is not, properly understood, the creation by judicial fiat of a beneficial interest in the trustee's property, but is a finding that a separation of legal and equitable interests exists by virtue of the act of the settlor, from whom *cestui* and beneficiary each derive their respective rights. Unfortunately, however, the *Golland* decision, handed down by a court of first resort, cannot be cited as overruling, since it really defies the prior precedent, which was the work of an intermediate appellate bench.

So far as the right to the protection of the statute is concerned, the trust relationship has occasioned no difficulty, it being the established rule that beneficiary and trustee both claim from their deceased settlor so as to permit either one to object to proof of transactions with the latter.<sup>56</sup>

A number of interesting types of cases have arisen in which persons acting in a representative capacity have sought, as alleged successors to the interest of deceased principals, to invoke the statute, or where that right was asserted upon the basis of succession to the rights of a deceased agent, executor, or other representative. The simplest of these is that in which a corporation, having contracted through its officer, since deceased, maintains that its contractual rights flow from him. This contention, needless to say, is rejected,<sup>57</sup> but with the qualification that if the officer contracts as an individual, borrowing property to be used for a corporate purpose, the rights of the entity have their source in the individual's contract so as to bring the statute into play.<sup>58</sup>

The administrators of a deceased bailee who concede that the estate

---

55. 84 Misc. 299, 147 N. Y. Supp. 263 (Sup. Ct. 1914).

56. *Moyer v. Moyer*, 21 Hun 67 (N. Y. 1880) (court erroneously stated witness was excluded because he, as trustee, claimed from settlor; court must have meant to protect objectant on that ground); *Putnam v. Lincoln Safe Deposit Co.*, 87 App. Div. 13, 83 N. Y. Supp. 1091 (3d Dep't 1903); *Equitable Trust Co. v. Pratt*, 117 Misc. 708, 193 N. Y. Supp. 152 (Sup. Ct. 1922).

57. *Hunt v. Providence Steamship Co.*, 9 N. Y. Civ. Proc. R. 291 (City Ct. 1886) (corporation not permitted to exclude proof of transaction with deceased president); *Curnan v. Delaware & Otsego R.R.*, 44 St. Rep. 923, 17 N. Y. Supp. 714 (Sup. Ct. 1892).

58. *Andrews v. National Bank*, 7 Hun 20 (N. Y. 1876).

does not have any interest in the subject matter of the bailment, may not exclude proof of transactions with the decedent. Consequently, if a bailor brings replevin against the bailee's administrators who, pleading as a defense that they had turned the property over to a third person, the true owner, do not assert that the decedent had any interest in the *res*, they could have no objection to proof of transactions with him.<sup>59</sup> However, in a slightly different but related type of situation, the statute would be applicable. In one case,<sup>60</sup> for example, the defendant was a bailee who, sued in conversion by his bailor, set up the *ius tertii*, claiming that he had delivered the property to the executors of the true owner. The plaintiff, in rebuttal, offered to prove by transactions with the decedent that the latter had made a gift of the *res* to her. This proof was excluded. The distinction between these cases is that in the first the administrators denied that the deceased bailee had any right to the property, and in the second the bailee defended the conversion action on the basis of the title of a deceased owner.

The case of *Carpenter v. Romer and Tremper Co.*<sup>61</sup> was an action to recover for the breach of a contract entered into by the defendant individually and by *E* as executor of *C*'s estate. By the time of trial *E* had died and, pursuant to the provisions of the will, he was succeeded by *H*, who brought suit. The defendant, of course, was not permitted to testify to dealings with *C*. In addition, however, the exclusion was extended to cover transactions with *E*, the deceased executor, upon the ground that because he had made the contract, he was the source of any right of action that *H* had. The decision is sound, for the proof in question is palpably within the mischief of the statute and, in this instance, at least, the broad wording of the rule served a statutory purpose.

One additional type of situation remains to be considered: a bank makes payment on a check after the depositor's death and, being sued by the executor or administrator for having wrongfully debited the account, seeks to prove by the payee's testimony that he was rightfully entitled to the money. It is well settled that the person to whom payment

---

59. *Hildick v. Williams*, 21 St. Rep. 166, 3 N. Y. Supp. 817 (City Ct. 1888); *Graturick v. Smith*, 202 App. Div. 600, 195 N. Y. Supp. 568 (4th Dep't 1922) (objectant held to claim from partnership in which decedent had been a member, and not from decedent, individually).

60. *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463 (1888) (defendants relied on decedent's title and, therefore, CODE CIV. PROC. § 829 applied); *GREENFIELD*, *op. cit. supra* note 19, at 232.

In *Byerer v. Smith*, 55 App. Div. 405, 66 N. Y. Supp. 968 (4th Dep't 1900) suit was brought for conversion of a watch. Objectant claimed to derive interest from a bailee and the court, holding that the right of possession was an "interest", sustained the objection.

61. 48 App. Div. 363, 63 N. Y. Supp. 274 (3d Dep't 1900).

was made may so testify, and the argument that the bank derives any right or interest from the payee is rejected.<sup>62</sup>

### *Third Party Beneficiaries*

Suppose that *A* as promisor and *B* as promisee, contract for the benefit of *C*, and after *A* has died or been adjudicated incompetent, the beneficiary sues either to enforce the agreement specifically or to recover for its breach. Does the fact that *B* furnished the consideration for *C*'s rights disqualify him from testifying in the plaintiff's behalf, to a transaction with the decedent or lunatic? Adorned on each occasion in a new set of superficial ramifications, but always reducible to these essentials, this question has been the subject of a series of interesting decisions extending over nearly half a century.

In *Godine v. Kidd*<sup>63</sup> and *Healy v. Healy*,<sup>64</sup> the earliest cases in point, the beneficiaries were infants whose parents, upon surrendering them for adoption, contracted with the foster parents whereby the latter were to make certain testamentary provisions for the children. Actions were brought by the beneficiaries against the estates of the respective promisors. The promisees were, in both instances, permitted to testify to their dealings with the decedents. Title, the courts said, did not come from the witnesses, since they never "could have maintained any action for this property", or "under any circumstances would have any interest therein."<sup>65</sup>

Our question arose next in *Bouton v. Welch*<sup>66</sup> where the plaintiff's testator and the husband of the defendant-beneficiary exchanged farms, the defendant joining in the latter's deed in order to release her dower right. It was further agreed that the testator, who was the defendant's uncle, was to take back a purchase-money mortgage upon the farm he deeded to the husband; that he was to retain the mortgage during his lifetime; and that upon his death it was to become the property of the

---

62. *Podmore v. Seamen's Bank*, 35 Misc. 379, 71 N. Y. Supp. 1026 (City Ct. 1901); *Farrar v. Farmers' Loan & Trust Co.*, 85 App. Div. 478, 83 N. Y. Supp. 172 (1st Dep't 1903); *Hoffman v. Union Dime Savings Inst.*, 95 App. Div. 329, 88 N. Y. Supp. 686 (1st Dep't 1904); *Glennan v. Rochester Trust & Safe Deposit Co.*, 152 App. Div. 316, 136 N. Y. Supp. 747 (4th Dep't 1912). See GREENFIELD, *op. cit. supra* note 19, at 155, 156. The contention that the bank derives from the payee the right to make payment is, of course, unsound, for the bank makes payment, not in consequence of any derivative right from the payee, but by reason of an obligation to the depositor, arising out of the original deposit by the drawer.

63. 64 Hun 585, 19 N. Y. Supp. 335 (1st Dep't 1892).

64. *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927 (4th Dep't 1900).

65. *Godine v. Kidd*, 64 Hun 585, 593, 19 N. Y. Supp. 335, 340 (1st Dep't 1892).

66. 170 N. Y. 554, 63 N. E. 539 (1902).



defendant. An action was brought by the uncle's executor to foreclose the mortgage. The defendant contended that, as a beneficiary of the contract, she was the owner, at least equitably, of the mortgage sought to be foreclosed. For the purpose of establishing her defense, she called her husband to testify to transactions with the decedent. The Court of Appeals, with two judges dissenting, upheld the trial court's ruling that the promisee was competent. Citing and following the *Godine* and *Healy* precedents, the majority of the court argued that the only person ever to hold the mortgage as a legally operative obligation was the testator who, therefore, was the only possible source of the beneficiary's rights.

Judge Cullen, in a very careful dissenting opinion, first treated the defendant beneficiary as one in the position of a plaintiff seeking specific performance of the provision that upon her uncle's death she was to be the owner of the mortgage. He argued, on this hypothesis, that, as a matter of contract law, a wife who sues on an agreement made by her husband, derives her cause of action from his legal and moral interest in contracting for her benefit; that, as a further rule of contract law, the supporting prop upon which rests the legal standing of a third-party beneficiary is the consideration paid by the promisee; and that, therefore, the husband, in the present case, was the ultimate purchaser and legal source of the beneficiary's title to the mortgage.

Judge Cullen then analyzed the question upon the assumption that the agreement in suit was executed at the time of the exchange of farms. Viewing the case in this light, he argued that at that time the decedent received a life estate in the mortgage, with remainder absolute to the defendant, and that it was *reductio ad absurdum* to say the remainder interest in the mortgage came from the intervening life tenant.

Two years after *Bouton v. Welch* there arose the historic case of *Rosseau v. Rouss*.<sup>67</sup> The plaintiff sued upon an oral agreement made between his mother and his putative father in which the mother agreed to support their infant son for a specified period, at the end of which the father was to settle upon the child a sum of money for his support thereafter. At the trial the contract was established mainly by the testimony of the mother, and the plaintiff recovered. The Court of Appeals reversed the judgment below, upon two grounds: that the mother was directly interested since, in the event of a recovery, she would not find it necessary to use her own money for the support of the child; and that the mother was the person through whom the plaintiff derived his interest and could not testify in his behalf. The argument of the court on the second of these points is as follows:

---

67. 180 N. Y. 116, 72 N. E. 916 (1904), three judges dissenting on the opinion of the Appellate Division in 91 App. Div. 230, 86 N. Y. Supp. 497 (1st Dep't 1904).

"The father made no promise to the plaintiff, but he promised the mother to pay the plaintiff the sum named. That, however, was not enough, for such a promise is not binding without a consideration. The plaintiff furnished no consideration for the promise, and would have had no interest in the contract unless a consideration had been furnished by some one. His mother furnished the sole consideration, and the promise was made by the father to the mother to pay the son, who thus derived his interest from her."<sup>68</sup>

*Bouton v. Welch* was distinguished upon the ground that the beneficiary in that case furnished part of the consideration, in the form of a release of her inchoate right of dower. The fact that the majority of the court disposed of the *Bouton* case in such tenuous fashion explains the strong concurring opinion of Chief Judge Cullen, whose earlier dissent was now to become law. The Chief Judge pointed out that the distinction between the *Bouton* and *Rosseau* cases could not be accepted, since the court in the former instance had not, by even a single word, rested its decision upon the fact that the beneficiary in that case released her inchoate right of dower in the deed to the promisor, but had decided the case upon the broad ground that a third-party beneficiary does not derive his interest from the promisee. Since that theory was about to be rejected, Chief Judge Cullen argued, it was but fair to the profession to declare *Bouton v. Welch* overruled.

The majority of the court, however, took a very different view and declared, in effect, that if any part of the consideration is given by the beneficiary he is deemed to be in direct privity of contract with the promisor. Section 347 has no application to such a situation, said the court, for the beneficiary's interest is not derivative but original. On the other hand, if no part of the consideration is paid by the beneficiary, his rights flow from the promisee, who is, thus, disqualified. This distinction between the *Bouton* and *Rosseau* cases is utterly without justification, for whether the beneficiary furnishes a portion of the consideration can have no possible connection with the trustworthiness of the promisee.

The history of *Rosseau v. Rouss* has been a stormy one. It was cited by the Court of Appeals for the first time in *Ward v. N. Y. Life Ins. Co.*,<sup>69</sup> which was an action to recover the face amount of a life insurance policy. Over the objection of the nominal beneficiaries, who were joined with the insurer as parties defendant, the plaintiff testified that the insured had made an assignment to her of the contract. The Court

---

68. See *Rosseau v. Rouss*, 180 N. Y. 116, 123, 72 N. E. 916, 919 (1904); cf. *Stillwell v. Bateman*, 158 App. Div. 907, 143 N. Y. Supp. 1145 (2d Dep't 1913). The *Rosseau* case was followed in *Roy v. Salisbury*, 134 N. Y. Supp. 733 (Sup. Ct. 1911).

69. 225 N. Y. 314, 122 N. E. 207 (1919).

of Appeals, sustaining the ruling of the trial court, and contrary to the implications of *Rosseau v. Rouss*, held that the objectant derived his right to the money, not from the decedent but from the insurance company and was, therefore, not entitled to the protection of Section 347. Here the court was concerned with the question of whether there is a devolution of title from the insured to the beneficiary so as to give the latter the protection of the statute. The question is, therefore, not precisely identical with that presented in *Rosseau v. Rouss*, which involved the other, similarly worded, phase of the section. There are, however, several significant respects in which the cases are most analogous: the right of a beneficiary of an insurance policy to recover the proceeds from the insured is, apart from insurance statutes, predicated upon his standing as a third party beneficiary under the common law of contracts;<sup>70</sup> the insured, paying the premiums, furnished the consideration upon which the beneficiary's standing depended, quite as truly as in *Rosseau v. Rouss*. And, finally, as a matter of literal statutory construction these cases, obviously, present the same problem.

No attempt has ever been made to reconcile the *Ward* case with *Rosseau v. Rouss* and an examination of the opinions reveals, at once, a marked conflict in approach.

For the first time in New York a court undertook in the *Ward* case to prescribe a concrete test by which it might be determined whether a person had succeeded to the title or interest of a decedent:

"The great body of authority makes it plain by inference at least, that when Section 829 (now section 347) speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise through him to the party who is protected by the section."<sup>71</sup>

Privity of interest or title, or something closely akin to privity is, then, the requirement which must be satisfied in order that the benefit of the statute may be available. This point of view is, indeed, a far cry from the argument in *Rosseau v. Rouss* and, by strong implication, serves notice that the subtleties which characterized the latter decision are to yield in favor of an earlier and more pointed observation that a promisee of a third-party beneficiary contract neither "could have maintained any action for this property" nor "under any circumstances would have any interest therein."<sup>72</sup>

70. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 369, n. 4.

71. See *Ward v. N. Y. Life Ins. Co.*, 225 N. Y. 314, 319, 122 N. E. 207, 208 (1919).

72. See *Godine v. Kidd*, 64 Hun 585, 593, 19 N. Y. Supp. 335, 340 (1892).

The *Ward* case was followed in *New York Life Ins. Co. v. Cross*, 7 F. Supp. 130

The effect of *Ward v. N. Y. Life Ins. Co.* was to leave the authority of *Rosseau v. Rouss* "somewhat shaken", said the Court of Appeals in *Crocker v. New York Trust Co.*<sup>73</sup> In this case a promisee, suing in equity, sought a decree of specific performance against the estate of the deceased promisor. The beneficiaries, joined as nominal parties defendant, were regarded by the trial court as the really interested plaintiffs, in whose behalf the promisee testified to a transaction with the decedent. *Rosseau v. Rouss*, in the opinion of the trial judge, had been decided upon the finding therein that the mother was directly interested, and, therefore, the elaborate argument in support of the proposition that a beneficiary claims "from, through or under" a promisee was merely dictum; and, since this dictum was out of harmony with the cogent reasoning of the *Bouton*, *Healy*, and *Godine* cases, this court, although one of first instance, flatly refused to follow it.<sup>74</sup>

The *Crocker* case was carried to the Court of Appeals and reversed upon the ground that the plaintiff was a person interested in the event since he could recover costs.<sup>75</sup> By way of dictum, however, the Court reviewed the authorities on the "from, through or under" provision of the statute. *Healy v. Healy* and *Bouton v. Welch* were candidly admitted to be antagonistic to *Rosseau v. Rouss*. Discussing the doctrine of the latter case the court said that although "the general rule [of *Rosseau v. Rouss*] remains . . . whether it would be applied if necessary to a decision or whether the closer if less ethical reasoning of the earlier cases would now be accepted, we need not determine."<sup>76</sup>

Since *Crocker v. New York Trust Co.*, only one third-party beneficiary case has arisen in the courts, the very recent *Matter of Browning*.<sup>77</sup> The Surrogate, contending that the *Crocker* case had reaffirmed *Rosseau v. Rouss*, refused to hear the promisee's testimony. On appeal, the Court of Appeals affirmed without opinion. Lacking any expression from the highest court, *Matter of Browning* adds little to the law in

---

(S. D. N. Y., 1934); *Ambrose v. United States*, 15 F. (2d) 52 (W. D. N. Y. 1926) (action under War Risk Insurance Act). The doctrine of the *Ward* decision was first stated in a dissenting opinion in *Baker v. Metropolitan Life Ins. Co.*, 111 App. Div. 500, 97 N. Y. Supp. 1088 (1st Dep't 1906).

73. 245 N. Y. 17, 23, 156 N. E. 81, 83 (1927); see (1927) 27 Col. L. Rev. 739.

74. The opinion was written by Justice Proskauer and is reported in 121 Misc. 725, 201 N. Y. Supp. 811 (Sup. Ct. 1923).

75. This rule has since been changed by an amendment as follows: "No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him." N. Y. CIV. PRAC. ACT (1921) § 347.

76. *Crocker v. N. Y. Trust Co.*, 245 N. Y. 17, 24, 156 N. E. 81, 83 (1927).

77. 165 Misc. 675, 1 N. Y. S. (2d) 67 (Surr. Ct. 1937).

point except to construe the rather ambiguous dictum in the *Croker* opinion, a reading of which leaves serious doubt as to whether the holding in *Rosseau v. Rouss* was intended to be strengthened or reopened for a fresh inspection.

A choice between the rule of privity in *Ward v. N. Y. Life Ins. Co.* and the more ethical reasoning of *Rosseau v. Rouss* is inevitable unless we are to have two virtually incompatible statutes simultaneously in force. The *Ward* case, reducing "from, through or under . . . by assignment or otherwise" to a convenient rule of thumb, is easier of application. It marks also a step in the growing confidence of the law either in the integrity of witnesses or the ingenuity of cross-examiners. Little else, however, is to be said in its favor. Legalistically, the decision invites attack. Its doctrine of privity leaves little in the case law of the inclusive rule undeniably intended by the legislature. Altogether too little play is allowed the broad wording which apparently contemplates more than succession, in the strict sense, to another's title or interest.

Besides being too narrow for the manifest scope of the statute, *Ward v. N. Y. Life Ins. Co.*, if generally applied, would admit the testimony of dangerous witnesses. Under its rule, Holly could testify for Lawrence against the estate of Fox. In that historic case, we recall, Fox owed money to Holly, who was indebted to Lawrence. The contract provided that the defendant was to satisfy his debt to Holly by paying the plaintiff. Here the promisee has a strong motive to falsify in behalf of the beneficiary, for if the latter recovers, the witness is relieved of the necessity of paying from his own pocket. *Rosseau v. Rouss*, which would bar the witness, far better effectuates the policy of the statute.

#### *Further Concerning Ward v. N. Y. Life Ins. Co.*

A second highly significant repercussion of the *Ward* case flows from the argument, an analogy used by the court to buttress its conclusion, that one who claims property by virtue of the exercise of a power of appointment in his favor, takes title from the donor of the power and not from the donee. By a parity of reasoning, it was argued, the insured stood in the place of a donee of a power, who had the right to designate the recipient of money belonging to the donor-insurer.

Apart from the aptness of this analogy, its influence on later developments cannot be denied. Fifteen years after the *Ward* case had posed the situation by hypothesis, *Matter of Carroll*<sup>78</sup> presented the novel question of whether, in a proceeding to construe the will of a donor, the beneficiaries of the power could testify to a transaction with the donee,

---

78. 153 Misc. 649, 275 N. Y. Supp. 911 (Surr. Ct. 1934).

to prove that the power had been validly exercised, against those who, concededly claiming from the donor, would take the disputed property in default of a proper exercise of power. Surrogate Foley, relying only on *Ward v. N. Y. Life Ins. Co.*, found that since the objectants succeeded to the interest of the donor, proof of transactions with the donee was admissible. The learned Surrogate went on, in a most clarifying opinion, to anticipate some of the consequences that might be expected to follow from his decision. In many cases, he pointed out, a testator who exercises a power for the benefit of certain persons, also makes gifts of his own property to some of the same beneficiaries. As a result a situation might very likely arise in which the heirs, legatees or other persons making a claim to the individual property of the donee, would be prohibited from testifying to a transaction with him for the purpose of sustaining or defeating the probate of his will, but, at the same time, would be competent to give such testimony so far as it bore upon the validity of the exercise of the power in their favor. Testimony, admissible on one issue but not on another, was not, in the view of the Surrogate, to be submitted to a jury without inviting injustice. At best, the issues respecting the disposition of the donee's own property might be tried separately from those arising as to the use of the power, and, even then, there was the possibility of having a will found valid by one jury and invalid by another.

To the end that these untoward consequences might be avoided, Surrogate Foley proposed that the Legislature amend Section 347 so as to exclude testimony of interested witnesses concerning transactions with the donee of a power. In 1935 the amendment was enacted.<sup>79</sup> It provided, in essence, that interested persons, or their predecessors in interest, may not testify to a transaction with the donee in a proceeding to probate or construe the instrument exercising the power. In this expedient and salutary fashion was avoided a choice between separate trials, with the likelihood of inconsistent findings of fact, and, as an alternative, a set of rules attendant with confusion and injustice.

---

79. The amendment is as follows: "A party or person interested in the event or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate." N. Y. CIV. PRAC. ACT (1935) § 347.

*The Debtor and Creditor Relationship*

The question frequently arises as to whether a creditor claims "from, through or under" his debtor. An affirmative answer would mean first, that the creditor has no right to call the debtor as his witness; and second, that if the debtor is deceased, the creditor may object to proof of a transaction with him.

It is axiomatic that a debtor has no property right in his own obligation, and hence, a promissory note or a bond, for example, which evidences a debt, has no inception as a legally operative instrument until it has been delivered to a person who has the right to enforce it. Therefore, it is argued in many of the cases, a creditor does not derive title to a debt from a debtor, so as to bring the statute into operation.<sup>80</sup>

Typical of the situations wherein this line of reasoning is applied is *Converse v. Cook*,<sup>81</sup> a suit by an indorsee of a note against the estate of the deceased maker. To prove protest and non-payment the plaintiff called as a witness a person obligated on the instrument as an accommodation maker, and who had delivered it to the payee. Because an obligor cannot be the source of the creditor's title to a debt, the accommodator was held competent as a witness for the creditor.

Quite difficult to reconcile with the *Converse* case are the decisions in *Geissman v. Wolf*<sup>82</sup> and *Roberts v. Mack*.<sup>83</sup> The former was a foreclosure action brought by the representatives of a deceased mortgagee. One of the defendants, the mortgagor's judgment creditor, who claimed

---

80. In *Wilcox v. Corwin*, 50 Hun 425, 3 N. Y. Supp. 317 (1888), *rev'd on other grounds*, 117 N. Y. 500, 23 N. E. 165 (1889), a payee brought suit on a note against one of the makers and the estate of the other. The plaintiff sought to prove the genuineness of the decedent's signature by the surviving obligor's testimony. This was permitted, since the plaintiff derived no title from the witness.

In *Benjamin v. Ver Nooy*, 36 App. Div. 583, 55 N. Y. Supp. 796 (3d Dep't 1899) the maker testified for the payee to a transaction with a deceased surety. The executor, who objected, argued that the surety's obligation had been transferred by the witness to the payee and that, hence, a disqualification arose. This argument was not sustained.

Attention is also directed to cases holding that the transfer of an obligation from decedent to objectant does not bring the statute into play. *Comstock v. Hier*, 73 N. Y. 269 (1878); *Holcomb v. Campbell*, 118 N. Y. 46, 22 N. E. 1107 (1889) (holder of mortgage not permitted to object to proof of transaction with deceased mortgagor); *Schlitz v. Koch*, 138 App. Div. 535, 123 N. Y. Supp. 302 (2d Dep't 1910).

81. 31 Hun 417 (N. Y. 1884). An assignee who takes from the payee is, of course, protected by the statute. *Wagner v. Grimm*, 169 N. Y. 421, 62 N. E. 569 (1902); *German-American Bank v. Slade*, 15 Misc. 287, 36 N. Y. Supp. 983 (Super. Ct. 1895).

82. 46 Hun 289 (N. Y. 1887).

83. 98 App. Div. 485, 90 N. Y. Supp. 526 (4th Dep't 1904); *cf. Hall v. Bond*, 68 App. Div. 293, 74 N. Y. Supp. 5 (2d Dep't 1902) (creditor's estate, in suit to set aside fraudulent conveyance, permitted to exclude testimony of grantor, offered by grantee, on ground that latter derived title from witness).

that the mortgage was fraudulent and gratuitous, was not permitted to examine the judgment debtor-mortgagor to establish a transaction with the deceased mortgagee. The court argued that "it is through or by means of the acts of the debtor" that the creditor "has any standing in the present litigation"<sup>84</sup> and that, hence, the creditor had no right to examine his debtor. In the *Roberts* case the rule was laid down that a creditor who brings an action to annul his debtor's fraudulent conveyance may not call the latter to prove a transaction with the deceased grantee.

The cases which turn upon the point that a creditor does not derive title to the debt from the debtor are, without exception, those wherein money judgments were sought upon the obligations in question. The *Geissman* and *Roberts* cases, however, present a different picture. In each of these instances it was charged that a debtor had attempted fraudulently to place his property beyond the grasp of creditors, who, by virtue of these wrongs, sought in one case to prevent a sale of the *res* under a spurious mortgage, and in the other to annul a conveyance. In a sense the bill of foreclosure opposed by the mortgagor's creditor, and the complaint against the fraudulent conveyance were directed not against the debtors personally but against their property, and in this sense, the actions were *in rem*. Taking this view of the cases it may be said with some cogency, that the right to oppose foreclosure or to set aside a deed arises as a result of acts done by the debtors with respect to their property and that, to paraphrase the court, it was these acts which yielded the rights asserted by the respective creditors. Thus, may the cases be distinguished from those wherein suit is brought to satisfy an obligation by a judgment *in personam* and it is held that the creditor does not take title to the debt from the obligor.<sup>85</sup>

---

84. See *Geissman v. Wolf*, 46 Hun 289, 290 (N. Y. 1887); *cf. Gillies v. Krender*, 33 Hun 314 (N. Y. 1884) and *Crane v. Shuler*, 91 Hun 635, 35 N. Y. Supp. 970 (1895), *aff'd on opinion below*, 153 N. Y. 656, 47 N. E. 1106 (1895), holding that the creditor-plaintiff does not claim from the debtor-grantor so as to be entitled to exclude proof of transactions with him. This is manifestly inconsistent with the *Geissman* and *Roberts* cases. This inconsistency is pointed out but not explained in *GREENFIELD, op. cit. supra* note 19, at 277.

85. The case of *Gordon v. Barney*, 43 Hun 633, 6 St. Rep. 181 (N. Y. 1887) tends to support our view, that the determining factor is whether the suit is brought for a money judgment or to enforce a right against the debtor's property. The action was in replevin against the estate of one who had seized the property as agent of a chattel mortgagee. The plaintiff testified to a transaction with the deceased mortgagor. On appeal this was held error, since the right of the mortgagee's agent to seize the chattel was derived from the mortgagor, thus giving the agent's estate the right to exclude the testimony. This case turns upon the point that the right here involved was *in rem* and not *in personam*, to sue on the mortgage indebtedness.



By drawing a line, however fine and uncertain, between *Converse v. Cook* on one hand, and the *Geissman* and *Roberts* cases on the other, we have averted the alternative, never more than a last resort, of choosing between precedents hopelessly in conflict. Reconciliation, if we may so term it, has been effected, but not without a price. We determine the competency of a witness to testify by asking whether the action is one to reduce a debt to a money judgment, in which event the statute has no application; or to pursue property wrongfully disturbed by the debtor, when a disqualification does result. This criterion, so laboriously evolved, does not justify whatever existence it may enjoy, for it is premised upon rules of law foreign to the real problem at hand, which is to exclude unreliable witnesses. To be specific: a creditor does not derive title to a debt "from, through or under" the debtor "by assignment or otherwise" because the debtor never had the title. The difficulty with accepting this argument is, however, that whether a debtor has an alienable interest in his own debt, and can be said to make a transfer of this interest to his creditor bears no relation to the debtor's reliability as a witness. On the other side of the picture we have the argument that a debtor who conveys property in fraud of a creditor, by that act gives him the right to trace the *res*; and that, since the cause of action flows from the debtor's wrong there is a derivation of interest, which works an exclusion. Here, again, the reasoning follows a path too far removed from the debtor's credibility which is the vital consideration. Since the classes of cases typified by *Converse v. Cook* and *Roberts v. Mack* are decided upon premises so remotely related to the ultimate inquiry, it is small wonder that distinctions, if sound at all, are far fetched and that rules seem arbitrary and unacceptable.

The holding that a creditor, suing to set aside a fraudulent conveyance, may not call to the witness stand the debtor who has defrauded him, carries the statute to a most harmful extreme. In the interest of the grantee's estate a creditor is deprived of the testimony of an opponent, who is friendly to the estate and not at all likely to falsify in favor of the party calling him. The task of proving the fraud, already an onerous one, becomes prohibitively difficult when the perpetrator of the wrong is given immunity even against direct examination which because it binds him, may well be the final undoing of the victim. The refined and difficult argument of *Geissman v. Wolf* yields a meager reward in this result.

#### *Qualifying an Interested Survivor*

A person who was incompetent as a witness by reason of interest could qualify himself to testify, by the weight of common law authority, if he

released that interest.<sup>86</sup> The same general rule obtains under the statute. A preliminary difficulty arises from the fact that the cases are not clear as to the formal requirements which must be met in order that the interest may be validly released. In one case a witness, who was a legatee, was held validly to have renounced his interest by giving testimony to that effect.<sup>87</sup> Under later decisions, however, only a document formally executed and properly delivered is effectual to unseal the lips of an heir.<sup>88</sup>

Passing from the form of the document, and assuming that it has effectually extinguished the interest of the proffered witness, we consider its operation and effect. The typical situation where a release is used is a probate proceeding in which a legatee seeks to testify in support of the will. If he is a residuary legatee, and is called as a witness by the other residuary legatees, their individual shares will be increased as a result of his release. Under the settled rule, however, the increment comes from the testator and, therefore, the legatee, not being the source of title, is not disqualified.<sup>89</sup> The releasor, in this type of case, is not a

---

86. In *Woods' Adm'r v. Williams' Ex'r*, 9 Johns. \*123 (N. Y. 1812), the witness had no present interest, but only a possibility of a future interest which, it was held, could not be released. By inference, however, the court indicated that, had the interest been a present one, the common law disqualification would have been removed by the release. Accord: *Newlin v. Newlin*, 1 S. & R. 274 (Pa. 1815); *Carter v. Trueman*, 7 Pa. 315 (1847). *Contra*: *Dyer v. Hopkins*, 112 Ill. 168 (1885).

87. *Matter of Berrien*, 58 Hun 610, 12 N. Y. Supp. 585 (1890). The court argued that the release was no more than a refusal to accept a gift which is valid, though oral. There is support for this view in 1 PERRY, TRUSTS (7th ed. 1929) § 270, where the learned author states that "it is now established that a parol disclaimer is sufficient in all cases of a gift by a deed or will of both real and personal estate."

88. *Matter of Forkington*, 79 Hun 128, 29 N. Y. Supp. 433 (1894) (release, addressed to presiding surrogate, produced in court but witness not permitted to testify because of failure to name releasee or to prove delivery); *Bennett v. Bennett*, 50 App. Div. 127, 63 N. Y. Supp. 387 (4th Dep't 1900) (failure to address release to anyone); *Matter of Fitzgerald*, 33 Misc. 325, 68 N. Y. Supp. 632 (Surr. Ct. 1900) (release required to take the form of conveyance under seal and to contain words of grant); *Matter of Parker*, 100 Misc. 219, 165 N. Y. Supp. 702 (Surr. Ct. 1917); *Harrington v. Schiller*, 231 N. Y. 278, 132 N. E. 89 (1921) (release in form of quitclaim deed, valid); *Matter of Millette*, 123 Misc. 745, 206 N. Y. Supp. 342 (Surr. Ct. 1924) (delivery of release to executor, valid).

89. *Matter of Wilson*, 103 N. Y. 374, 8 N. E. 731 (1886) (probate proceeding); *Matter of Lawler*, 253 App. Div. 120, 1 N. Y. S. (2d) 305 (4th Dep't 1937); *Matter of Garner*, 59 Misc. 116, 112 N. Y. Supp. 212 (Surr. Ct. 1908); *Matter of Klein*, 118 Misc. 423, 193 N. Y. Supp. 755 (Surr. Ct. 1922) (infant's release ineffectual); see Note, 28 A. L. R. 6 (1924).

In *Bennett v. Bennett*, 50 App. Div. 127, 129, 63 N. Y. Supp. 387, 388 (4th Dep't 1900) it was stated that an heir at law who gave a release could not testify for the other heirs seeking to contest a will, inasmuch as those calling the witness would derive title from him by virtue of the release. The case is not distinguishable on principle from those of

trustworthy witness. The reception of his testimony is certainly subject to the evils at which the statute is directed.<sup>90</sup> His competency to testify, purchased with the consideration that supports the release and compensates him for surrendering the legacy, leaves as a witness a true ally of those in whose behalf he speaks. A creditor, seeking to annul his debtor's fraudulent conveyance, is held, in the cases under the statute, to derive his rights "through or by means of the acts of the debtor." An equally cogent argument might be made that the release given in the instant cases, is the act by virtue of which those who call the releasor, will obtain a direct benefit. The usual overly vigilant attitude of the courts, here applied, would better effectuate the end of the statute.

### *Miscellaneous Interesting Situations*

There remain a number of interesting situations which cannot accurately be classified under any of the preceding headings, but are of sufficient importance to merit discussion. Several cases have arisen wherein the state brings a proceeding to assess a decedent's estate for the purpose of levying a tax under the Transfer Tax Law and the beneficiaries seek to prove, by transactions with the deceased, that the true value of the property is less than that claimed by the taxing power. It is settled law that in this situation the estate does not claim its revenue from the decedent so as to have the right to exclude the proof. The tax is upon the beneficiaries and they are the source of the claim made by the state.<sup>91</sup>

A person who, by contract, assumes an obligation of a decedent, may not invoke the statute when suit is brought against him upon his own agreement.<sup>92</sup> The liability which is enforced in such an action is not that of the decedent, but of the defendant alone. And, along the same line, if an executor, in order to compromise a claim asserted by a third

---

residuary legatees, and since the court gave other reasons for its decision (see note 88, *supra*) the language on this point may be regarded as an overruled dictum. But *cf.* *Matter of Williams*, 121 Misc. 243, 201 N. Y. Supp. 205 (Surr. Ct. 1923). See also *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587 (1893) which on principle is contrary to the weight of authority.

90. Only once, and then in a dissenting opinion, was anything said by way of suspicion as to the good faith of parties. See *Beaver v. Beaver*, 62 Hun 194, 203, 16 N. Y. Supp. 746, 748 (1891) where Justice Landon, dissenting, said: "This practice [giving a release to qualify a witness] is open to abuse, but as it is authorized by authority we must recognize it."

91. *Matter of Gould*, 19 App. Div. 352, 46 N. Y. Supp. 506 (1st Dep't 1897); *Matter of Brundage*, 31 App. Div. 348, 52 N. Y. Supp. 362 (4th Dep't 1898); *Matter of Kolb*, 114 Misc. 361, 186 N. Y. Supp. 670 (Surr. Ct. 1921).

92. *Stephens v. Cornell*, 32 Hun 414 (N. Y. 1884).

person against the decedent's property, contracts, as an individual, to pay a sum of money for a release of the claim, he has no valid objection, in a suit on the contract, to proof of transactions with the decedent.<sup>93</sup> Likewise, where a decedent devises property which he held subject to a lease or other contractual right of a third person, the devisee, upon renewing the contract, forfeits the right, in the event of suit by the other contracting party, to raise the objection afforded by the statute.<sup>94</sup>

Among the classes of persons who may invoke the protection of the statute is one described as the "survivor" of the decedent or lunatic. In view of the fact that this personage bears a strong resemblance to a successor in interest, we treat briefly with his identifying characteristics. The word "survivor" has been strictly construed. It applies mainly to a surviving partner, with the result that in suits involving rights or liabilities that spring from the partnership relation the "survivor" is immune to proof of transactions with his deceased co-partner.<sup>95</sup> To illustrate: an action is brought against a surviving partner individually upon an agreement which the plaintiff claims to have made with the firm. The plaintiff, in order to prove the contract, seeks to testify to conversations with a deceased partner. Proof of this character is subject to objection upon the ground that the person against whom it is offered is the "survivor" of the decedent.

### Conclusion

We have been through the maze, a long and circuitous journey, treating the cases from the viewpoint of how each situation is affected by the words of the statute. We come now to a consideration of the problem in the broader settling of underlying policy, and, dealing with the subject in this light, record the following impressions:

*First:* The potential breadth of "a party or person interested in the event" is, thus, bounded by the requirement that the interest must be such as to raise a strong likelihood of falsification. No such salutary limitation describes the scope of the "from, through or under" rule, which is applied indiscriminately wherever title is in issue. Anomalously, the person whose interests, albeit remote and contingent, are at stake, is less readily disqualified than one whose legal rights or liabilities are not at all involved.

---

93. *Hall v. Richardson*, 22 Hun 444 (N. Y. 1880), *aff'd*, 89 N. Y. 636 (1882).

94. *Titus v. O'Connor*, 18 Hun 373, 57 How. Pr. 391 (N. Y. 1879).

95. *Levy v. Louvre Realty Co.*, 222 N. Y. 14, 118 N. E. 207 (1917) (foreclosure action); *Brimo v. Revillon*, 139 Misc. 416, 247 N. Y. Supp. 698 (Sup. Ct. 1931); see *Melkow v. H. B. Kirk & Co.*, 220 App. Div. 180, 181, 220 N. Y. Supp. 551, 553 (1st Dep't 1927) where the court said that the rule would apply to partners, co-adventurers, or joint debtors.

"A party or person interested in the event" is, under the cases, one who has a present, certain and direct interest in the litigation, in that he will gain or lose by the direct legal operation of the judgment, or because the record may be evidence for or against him in some other action.<sup>96</sup> Cases are frequent, however, in which a person, sometimes even a nominal party,<sup>97</sup> has a valuable interest which, because it is contingent, remote or indirect, does not disqualify him. In one instance,<sup>98</sup> for example, a defendant, who was sued on notes that he had made through a general agent, sought to call the latter for the purpose of proving payment. Objection was made that the witness was interested, for if payment was not shown, he would be liable to his principal for misappropriation of funds, or for negligence in permitting the creditor to retain the paid notes. Because a judgment for the plaintiff would not preclude the agent from establishing, in a later suit against him, that he had made payment, he was permitted to testify, even though he was very much interested, since a judgment for the defendant would mean that no suit could be brought for neglect or misappropriation. In another case<sup>99</sup> a mother was not disqualified from testifying as to the legitimacy of her son, despite the fact that if her testimony established him as an heir at law she would be entitled to dower consummate in an estate, the alleged husband being already dead.

No change in the statute is needed to correct the situation; far more advisable is an approach to the "from, through or under" clauses with an eye to the position of the witness, so as to confine the disqualification to the situations where it is needed. Refined and tenuous arguments such as we found in the debtor and creditor cases should be resorted to, if ever, only where the manifest purpose of the statute so requires. Careful discrimination characterizes the viewpoint of the courts in construing the words "a party or person interested in the event". A like attitude, even if it amount to legislation, would confine to a minimum the number, not yet large, of erroneous decisions on the "from, through or under" provision.

*Second:* It has been suggested that a predecessor in title must be disqualified in order to prevent a person from circumventing the statute by simply assigning his interest.<sup>100</sup> On the assumption that this is the

---

96. *Matter of Abwender*, 241 App. Div. 566, 272 N. Y. Supp. 569 (4th Dep't 1934); *Matter of Demmerle*, 130 Misc. 684, 225 N. Y. Supp. 190 (Surr. Ct. 1927); *Matter of Zimmerman*, 161 Misc. 473, 292 N. Y. Supp. 236 (Sup. Ct. 1936), *rev'd on other grounds*, 254 App. Div. 630, 3 N. Y. S. (2d) 212 (4th Dep't 1938).

97. *Laka v. Krystek*, 261 N. Y. 126, 184 N. E. 732, 88 A. L. R. 248 (1933).

98. *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894 (1887).

99. *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024 (1891).

100. *General Bonding & Casualty Ins. Co. v. McCurdy*, 183 S. W. 796 (Tex. Civ. App.

purpose of the rule, there is still no reason for refusing to hear the testimony of one who assigned during the lifetime of the decedent or before an adjudication of lunacy.

There is, of course, no way of knowing how many spurious assignments would be made, were it not for the bar against prior title holders. This preventive feature of the statute is, however, clearly not adequate justification for its sweeping provisions. In Texas, where the terms of the law do not exclude predecessors in title, the courts, by a pardonable bit of judicial legislation, have solved the difficulty, holding the assignor incompetent where death or mental incapacity preceded the assignment.<sup>101</sup> It is apparent, therefore, that the rule which disqualifies a transferor of interest or title cannot be said to have as its purpose to prevent the circumventing of the statute by the concealment of the true party in interest.

*Third:* On the whole, the decisions construing the "from, through or under" provision are satisfactory. The only situations in which there is ground for serious criticism are some of the debtor and creditor cases, where the bar is wrongly brought down; the decisions permitting a legatee to testify by giving a release; the holding that a promisee may testify for a third-party beneficiary only if the latter furnishes part of the consideration moving to the promisor; and, lastly, the doctrine of *Ward v. N. Y. Life Ins. Co.*

On the credit side of the ledger it is to be noted that a dangerous type of witness is excluded. In the basic case, where *A* sells to *B*, who is later sued in replevin by *C*'s administrator, claiming the property for the estate, there is good reason to argue that *A*, could he testify in *B*'s behalf, would be strongly inclined to try to protect his vendee's title. This simple situation, however, is not typical of the cases in which the courts are required to decide whether there has been a devolution of interest within the meaning of the section. More frequently, subtle rather than plain argument, difficult and not simple cases, are presented. It is then, as was observed in dealing with the debtor and creditor relationship, that the reasoning upon which distinctions are drawn and results reached tends to follow a path far remote from the starting point—the reliability of the witness. Along the same line it may be said that the question of whether to exclude the mother-promisee from testifying for her infant-beneficiary is better answered by looking for the financial interest of the witness, than for the relationship of predecessor and

---

1916). See Cheek, *Testimony as to Transactions with Decedents* (1927) 5 TEX. L. REV. 149, 157.

101. General Bonding & Casualty Ins. Co. v. McCurdy, 183 S. W. 796 (Tex. Civ. App. 1916).

successor. Whether to take the testimony of a releasing legatee should depend not upon his being the source of title of those whose interests are increased, but upon the likelihood that the instrument is spurious. And, finally, whether an indorser of a note should be permitted to testify for an indorsee, or in the simple situation, a vendor for his vendee, are questions that should be answered not by tracing the chain of title but, as was the common law rule, by considering the possibility of a suit over against the witness, should the title he gave prove defective.

The fault is not with the broad exclusionary principle, but with the fact that the "from, through or under" rule is not, in difficult cases, readily adaptable to its purpose. Succession to the interest of witness or decedent serves often merely as a pretext for exclusion or protection which rests, soundly enough, upon a basis more directly addressed to the danger sought to be avoided. Such errors as are to be found in the decisions are attributable to one simple fact—that the statute carries the courts too far from the heart of the problem.

*Fourth:* In view of the generally satisfactory handling of an inherently dangerous situation, and in view of the peril that any change of the statute might involve, the preferable cure for such difficulties as exist, would seem to be by judicial interpretation rather than legislation. If, in the work of construction and application, the thought is borne ever in mind that reliability of witnesses and necessity for protection should be the focal points of inquiry, favorable results may be expected.

# FORDHAM LAW REVIEW

*Published in January, May, and November*

---

VOLUME IX

JANUARY, 1940

NUMBER 1

---

*Subscription price, \$2.00 a year*

*Single issue, 75 cents*

---

Edited by the Students of the Fordham Law School

## EDITORIAL BOARD

WILLIAM J. DALY, JR.  
*Editor-in-Chief*

HERBERT M. SILBERMAN  
*Comment Editor*

CARMINE J. CAPOZZOLA  
*Decisions Editor*

PAUL F. GRIFFIN  
*Legislation Editor*

WILLIAM H. COOGAN  
*Business Manager*

SEWARD I. BENJAMIN  
*Associate Decisions Editor*

JOSEPH R. KELLY  
*Book Review Editor*

LEO D. BURRELL  
THOMAS W. CLEARY  
JOSEPH E. GALLAGHER  
ALBERT GREENBERG  
THOMAS F. HILBERT, JR.  
MARVIN I. KERNER  
JOHN T. KERRIGAN

ELSIE KOVACS  
HARRY J. MCCALLION  
GEORGE G. MCKENNA  
HOWARD MILLER  
BERNARD MOLDOWSKY  
HENDERSON W. MORRISON, JR.  
HAROLD MULVEY

CAESAR L. PITASSY  
SALVATORE PINO  
JOSEPH ROSENZWEIG  
LESTER RUBIN  
ELEANOR SHOEMAKER  
CONCETTA TALLINI  
ROBERT WELCH

WALTER B. KENNEDY  
WILLIAM R. WHITE, JR.  
*Faculty Advisors*

*Student Contributor to this Issue*

CLAUDIA L. SILK

Editorial and General Offices, Woolworth Building, New York

---

## CONTRIBUTORS TO THIS ISSUE

JOHN F. X. FINN, A.B., 1920, College of the City of New York; LL.B., 1923, Fordham University, School of Law. Member of the New York and Federal Bars. Associate Professor of Law, Fordham University, School of Law. Co-author CARMODY'S MANUAL OF NEW YORK PRACTICE (1938); KEENER'S CASES ON CONTRACTS (3d ed. 1934); COMPACT MANUAL OF CIVIL PRACTICE STATUTES (1933). Author of *The Forging of Good Unilaterals out of Bad Bilaterals* (1933) 3 BROOKLYN L. REV. 6; *New Procedure For Old* (1935) 4 FORDHAM L. REV. 224, and other articles.

CHARLES F. MULLETT, A.B., 1922, Syracuse University; M.A., 1923, Clarke University; Ph.D., 1933, Columbia University. Associate Professor of History, University of Missouri. Author of FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION (1933); *The Legal Position of the English Protestant Dissenters* (1937) 23 VA. L. REV. 389, (1939) 25 VA. L. REV. 671. Contributor to various legal and historical periodicals.

ARTHUR H. GOODMAN, LL.B., 1938, Fordham University, School of Law. Member of the New York Bar. Comment Editor, FORDHAM LAW REVIEW, 1937-8.

---

The views expressed in any article, note, comment or book review are those of the individual contributor and not those of the FORDHAM LAW REVIEW.